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Nos. 96-843 & 96-847

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OCTOBER TERM, 1997

NATIONAL CREDIT UNION ADMINISTRATION,
Petitioner,

and

AT&T FAMILY FEDERAL CREDIT UNION and
CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,

v.

FIRST NATIONAL BANK AND TRUST CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS AT&T FAMILY FEDERAL CREDIT UNION AND CREDIT UNION NATIONAL ASSOCIATION, INC.

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE BANKS LACK STANDING	2
II. NCUA'S MULTIPLE GROUP POLICY IS A REASONABLE INTERPRETATION OF AMBIGUOUS STATUTORY LANGUAGE	11
CONCLUSION	20

TABLE OF AUTHORITIES

Cases — Page

Air Courier Conference of America v. *American Postal Workers Union, AFL-CIO*, 498 U.S. 517 (1991) 3
Association of Data Processing Service Organizations v. *Camp*, 397 U.S. 150 (1970) 3, 4
Bennett v. *Spear*, 117 S. Ct. 1154 (1997) ..... *passim*
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ..... *passim*
Clarke v. *Securities Industry Association*, 479 U.S. 388 (1987) 5
Consumer Product Safety Comm'n v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 17
Department of the Treasury v. *Federal Labor Relations Auth.*, 494 U.S. 922 (1990) 19-20
First City Bank v. *NCUA*, 111 F.3d 433 (6th Cir.), *pets. for cert. filed*, Nos. 96-2018 (June 23, 1997) & 97-100 (July 15, 1997) 16, 19
Investment Company Institute v. *Camp*, 401 U.S. 617 (1971) 4, 5
K Mart Corp. v. *Cartier, Inc.*, 486 U.S. 281 (1988) 13
Kelly v. *Robinson*, 479 U.S. 36 (1986) 8
Lujan v. *National Wildlife Federation*, 497 U.S. 871 (1990) 3
National Railroad Passenger Corp. v. *Boston & Maine Corp.*, 503 U.S. 407 (1992) 13
Regents of University of California v. *Public Employment Relations Board*, 485 U.S. 589 (1988) 15
Rust v. *Sullivan*, 500 U.S. 173 (1991) 16
United Air Lines, Inc. v. *McMann*, 434 U.S. 192 (1977) 17
Warth v. *Seldin*, 422 U.S. 490 (1975) 10

Statutory Provisions — Page

12 U.S.C. § 1757(5) 4
12 U.S.C. § 1757(5)(x) 4
12 U.S.C. § 1757(14) 17

TABLE OF AUTHORITIES—Continued

12 U.S.C. § 1785(h) 17, 18
25 U.S.C. § 473a 12
Community Reinvestment Act, Pub. L. No. 95-128, 91 Stat. 1147 (1977) 7
District of Columbia Credit Unions Act, Pub. L. No. 72-190, 48 Stat. 326 (1932) 7, 8
Pub. L. No. 75-416, § 4, 51 Stat. 4 (1937) 7

Regulatory Provision

54 Fed. Reg. 31,170 (1989) 18

Legislative Materials

H.R. Rep. No. 23, 95th Cong., 1st Sess. (1977) 17
S. Rep. No. 536, 97th Cong., 2d Sess. (1982) 17
75 Cong. Rec. 7889 (1932) 8
78 Cong. Rec. 12,224 (1934) 9
Competition and Conditions in the Financial System: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs, 97th Cong., 1st Sess. 109 (1981) 18
Credit Unions and Small Loans: Hearings Before the Senate Comm. on the District of Columbia on S. 4775, 71st Cong., 3d Sess. (1931) 8
Credit Unions: Hearings Before a Subcomm. of the Comm. on Banking and Currency, 73d Cong., 1st Sess. (1933) 9
Incorporation of Credit Unions: Hearings Before the Senate Comm. on the District of Columbia on S. 1153, 72d Cong., 1st Sess. (1932) 8

Other Authorities

John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673 (1997) 20
NCUA 1996 Annual Report 10
Sheshunoff Bank Quarterly (1997) 10

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REPLY BRIEF FOR PETITIONERS AT&T FAMILY FEDERAL CREDIT UNION AND CREDIT UNION NATIONAL ASSOCIATION, INC.

As we explained in our opening brief, the Court of Appeals erred in allowing the Banks—whose competitive interests are antithetical to those that Congress intended to protect through the common bond provision—to thwart Congress' purposes by substituting their preferred interpretation of ambiguous statutory language for that of the agency entrusted by Congress to administer the statute. It is telling that the Banks do not even *attempt* to defend the reasoning of the Court of Appeals, either on standing or on the merits. Whereas the Court of Appeals found standing on the theory that the Banks—although their

interests are not among those that Congress intended to protect—are nevertheless "suitable challengers" to vindicate Congress' intended purposes, the Banks largely ignore Congress' intent in enacting the common bond provision and contend that they have standing merely because NCUA's ruling has caused them competitive injury. And whereas the Court of Appeals purported to find that the plain language of the statute unambiguously precludes NCUA's multiple group policy, the Banks pay little attention to the statutory language directly at issue and instead urge the Court to override NCUA's policy based largely on snippets of legislative history, most of which do not even relate to the FCUA itself.

The Bank's defense of the Court of Appeals' judgment is as flawed as that court's own rationale. Absent any indication that Congress intended the common bond provision to protect competitive interests of the sort asserted by the Banks, they lack standing under the APA. But even if the Court were to hold otherwise, under *Chevron* the Court should defer to the agency's interpretation of the ambiguous statutory language, rather than to the purported import of legislative history that is itself unclear.

I. THE BANKS LACK STANDING

1. The Banks have eschewed the "suitable challenger" doctrine that formed the basis for the Court of Appeals' ruling on standing; indeed, the words "suitable challenger" do not even appear in their brief. *Contrast* Pet. App. 26a, 29a, 30a, 31a, 33a n.3, 34a. Instead, the Banks' argument consists principally of a simplistic syllogism: (a) the Banks are competitors of credit unions; (b) NCUA's interpretation adversely affects the Banks' competitive interests; and therefore (c) the Banks have standing under the APA. Or as the Banks themselves put it, "the competitive injury suffered by banks means that they are 'aggrieved by agency action within the meaning of a relevant statute' under Section 10 of the Administrative Procedure Act, and therefore have standing to challenge

the NCUA action." Resp. Br. at 10. That is decidedly not the law. As this Court has stressed, such an argument is "mistaken, for it conflates the zone-of-interests test with injury in fact. * * * [I]njury in fact does not necessarily mean one is within the zone of interests to be protected by a given statute." *Air Courier Conference of America* v. *American Postal Workers Union, AFL-CIO*, 498 U.S. 517, 524 (1991).

Contrary to the Banks' contentions, there is no exception to the zone of interests test for cases involving competitive injury. In every case, the controlling question is whether the injury asserted by the plaintiff "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis of his complaint." *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 883 (1990). *See Bennett* v. *Spear*, 117 S. Ct. 1154, 1161, 1167 (1997); *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 153 (1970). Thus, the question here is not whether the Banks have suffered competitive injury as a result of NCUA's interpretation of the common bond provision; the question is whether their competitive interests are among the interests that provision was intended to protect or regulate.

The Banks' theory—which would equate competitive injury with prudential standing—is even broader than the suitable challenger doctrine they so studiously avoid, for under the Banks' theory competitors would be accorded standing without any analysis of whether their competitive interests bear a relation to the purposes of the statute. For example, if the Federal Aviation Administration, acting pursuant to an airline safety statute, were to issue a regulation that had the effect of increasing the number of passengers allowed on flights, under the Banks' proposed rule a railroad trade association would be able to challenge the regulation on the theory that more airline passengers means fewer railroad passengers—notwithstanding that the safety statute was plainly intended to benefit airline pas-

sengers, not airline competitors. Likewise, the Banks would have standing to challenge NCUA's interpretation of restrictions on the loans that credit unions may make to members, *see* 12 U.S.C. § 1757(5), on the theory that any such restriction inures to the competitive advantage of banks—notwithstanding that these restrictions (like the common bond provision) were plainly intended to protect credit unions and their members, not banks or other competitors.[1] The zone of interests test would be rendered meaningless if such a theory were accepted.

2. Contrary to the Banks' contentions, none of this Court's precedents has established a different standing analysis for plaintiffs who allege competitive injury. Rather, as explained in our opening brief, *see* ATTF Br. at 26-29, in each of the Court's cases upholding competitor standing, Congress has evinced a specific intent to regulate competition in some way. Thus, in *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971) ("ICI"), the Court described its prior decision in *Data Processing* as having held that "Congress had arguably legislated against the competition that the petitioners sought to challenge, and from which flowed their injury." *Id.* at 620. In their brief, the Banks distort this quotation by rephrasing the question as whether Congress had legislated "against banks *engaging in the particular activities constituting* 'the competition that the petitioners sought to challenge, and from which flowed their injury.'" Resp. Br. at 19 (quoting *ICI*, 401 U.S. at 620) (emphasis supplied). The Banks' distortion is important. *Whenever* a plaintiff contends that it has suffered competitive injury as a result of an allegedly improper administrative determination, the plaintiff will necessarily allege that Congress has legislated against the particular *activities* constituting the competition from which its injury flows. But zone of interests standing will exist only when Congress has actually "legislated against the competition" *itself*. *ICI*, 401 U.S. at 620, 621. Otherwise, the mere existence of Article III injury-in-fact would suffice to accord prudential standing under the APA.

[1] For example, 12 U.S.C. § 1757(5)(x) prohibits a credit union from issuing to any member loans exceeding 10 percent of the credit union's capital and surplus. A regulation allegedly easing this limit would arguably injure banks competitively, since a member barred from further credit union loans might go to a bank. Banks would nonetheless lack prudential standing to challenge the regulation, because the statutory provision was intended not to protect banks from competition but to promote credit union financial stability and the interests of credit union members—just like the common bond provision. *See* ATTF Br. at 20-25.

The Court's other standing cases confirm that the mere allegation of competitive injury is not sufficient to confer standing under the APA. For example, in *Clarke* v. *Securities Industry Association*, 479 U.S. 388 (1987), the Court did not rely simply on the fact that the plaintiffs were competitors of the regulated entities, but rather made clear that the statute at issue was intended "to keep national banks from gaining a monopoly control over credit and money through unlimited branching." *Id.* at 403. Likewise, in *Bennett*, *supra*, the Court did not rely on the fact that the plaintiff ranchers "claim[ed] a competing interest in the water" at issue, but instead carefully analyzed the statutory provision in question and concluded that the plaintiffs had standing because the specific interest they asserted—the prevention of inefficient agency decisions—was plainly among those Congress intended to protect when it required agency decisions to be made on the basis of the best available scientific and commercial data. *Id.* at 1160, 1168.

To be accorded standing as a competitor, it is not necessary that competition itself be the sole focus of the legislation. Rather, as we have explained (*see* ATTF Br. at 27), the Court has found competitor standing where Congress believed that a restriction on competition was the appropriate means to achieve some greater end. *See Clarke*, 479 U.S. at 398 (describing holding in *ICI*). And contrary to the Banks' mischaracterization, neither we nor NCUA contend that "the plaintiff's specific type of

institution must be particularly mentioned in the legislative history." Resp. Br. at 23. But where, as here, Congress has not legislated against competition at all and had no intent to benefit the plaintiff's particular interests, the plaintiff is not within the zone of interests protected by the statute and lacks standing under the APA.

3. It is not surprising that the Banks have postulated a new theory of competitor standing that does not depend on Congress' intent. For as we have explained (*see* ATTF Br. at 20-25), the common bond provision was clearly intended to protect credit unions and their members, not banks or other competitors. As we further explained—and as the Banks do not dispute—Congress saw its proposed credit unions as largely serving a market that banks had disdained, and thus one that did not even implicate their competitive interests. *Id.* at 5-6, 22. Finally, the Banks ignore the fact that every court to have addressed the issue—including the court below—has concluded that the purposes of the common bond provision have nothing to do with (and in fact are antithetical to) the competitive interests of banks. *Id.* at 23-24.

Rather than relying on the actual intended purpose of the common bond provision, the Banks spin out a grand unified theory under which Congress purportedly segmented the financial services markets to protect the various segments from competition, providing benefits to each group conditioned on various restrictions enforceable by the competing entities. *See* Resp. Br. at 11-12, 16, 24-25. The Banks, however, offer no support for their contention that the common bond provision was part of some broader design for protecting banks from competition, and there is no such support.[2]

[2] As part of their theory, the Banks note that "credit unions do not pay federal taxes and are not covered by the Community Reinvestment Act or certain other laws, but the membership of a credit union is limited by the common bond requirement." Resp. Br. at 11-12. This theory suffers from a fundamental anachronism: when the common bond provision was enacted, federal credit unions were *not* exempt from federal taxes, and would not be for several years, *see* Pub. L. No. 75-416, § 4, 51 Stat. 4 (1937), while the Community Reinvestment Act, Pub. L. No. 95-128, 91 Stat. 1147 (1977), was not even a gleam in a legislator's eye. The common bond provision was thus hardly a restriction imposed in exchange for the benefit of exemption from these provisions.

The common bond provision has nothing to do with competition. Unlike the banking statutes relied on by the Banks, the common bond provision does not prevent credit unions from offering services provided only by banks. Instead, the provision is a useful organizing principle that also helps ensure the strength and viability of credit unions by requiring that each member be part of a group with others who are similarly situated. Congress thought this was one of the features that had allowed state credit unions to emerge from the Great Depression unscathed, and wanted to ensure that federal credit unions enjoyed similar strength and stability. *See* ATTF Br. at 5. The fact that competitors of banks have been accorded standing to enforce various anti-competition limitations contained in banking statutes says nothing at all about whether banks have standing to enforce a quite different provision in the FCUA that has nothing to do with competition.

4. As a fallback argument, the Banks contend—contrary to the holding of the Court of Appeals—that the FCUA and its legislative history demonstrate that the common bond provision was in fact intended to protect banks from competition with credit unions. *See* Resp. Br. at 24-27. Yet the Banks can point to nothing in the FCUA itself or its legislative history that supports this assertion. Instead, the Banks rely principally on the legislative history of an earlier statute, the District of Columbia Credit Unions Act. That legislative history, moreover, consists largely of hearing testimony from a bankers' representative, rather than statements by the legislators themselves. Accordingly, the material relied on by the Banks can shed little, if any, light on what was intended by the Congress

that enacted the D.C. Act, let alone the later Congress that enacted the FCUA. *See, e.g., Kelly* v. *Robinson*, 479 U.S. 36, 51 n.13 (1986) (according no significance to statements where "none of [the] statements was made by a Member of Congress, nor were they included in the official Senate and House Reports.").

Even if the legislative history of the D.C. Act were relevant in construing the FCUA, the material cited by the Banks would not support their contention at all. It shows only that banking interests had expressed views on certain provisions of the D.C. Act, *none of which had anything to do with the common bond provision.* During hearings on the D.C. law, a bankers' representative objected only to three proposed provisions: one allowing D.C. credit unions to accept deposits from members (rather than requiring the members to purchase shares), another requiring the credit unions to deposit their excess funds only in national banks (rather than state banks as well), and another granting tax exemptions to the credit unions. *See Incorporation of Credit Unions: Hearings Before the Senate Comm. on the District of Columbia on S. 1153*, 72d Cong., 1st Sess. 25-26, 28, 32, 36 (1932) [hereinafter, "*1932 Hearings*"]. The first two items were addressed through amendments, *see* 75 Cong. Rec. 7889 (1932), but the tax exemption was retained in the final version of the D.C. law. *See* Pub. L. No. 72-190, 48 Stat. 326, 331 (1932).

The concerns of banking interests, however, had no effect on Congress' consideration of the D.C. Act's common bond provision or any other provision relating to credit union membership. As the Banks concede (*see* Resp. Br. at 25), the common bond provision was included in the proposed legislation *from the outset*, and was even included in an earlier D.C. credit union bill introduced in 1931. *See 1932 Hearings* at 3; *Credit Unions and Small Loans: Hearings Before the Senate Comm. on the District of Columbia on S. 4775*, 71st Cong., 3d Sess. 1-3 (1931). Moreover, as this Court recently emphasized, the zone of interests question is to be determined "by reference to the particular provision of law upon which the plaintiff relies." *Bennett*, 117 S. Ct. at 1167. Thus, even if the legislative history of the D.C. Act were relevant, hearing testimony relating to *other* provisions of that law is of no probative value in the standing inquiry now before the Court.[8]

The Banks also contend that the problem of competitive injury to banks was raised and addressed during consideration of the FCUA itself. Resp. Br. at 26. The Banks' two citations, however, do not even remotely support that assertion. During hearings on the FCUA, a senator inquired whether commercial banks opposed the establishment of credit unions, and was told that they did not. *See Credit Unions: Hearings Before a Subcomm. of the Comm. on Banking and Currency*, 73d Cong., 1st Sess. 20 (1933). And in a subsequent exchange on the floor of the House, a representative was asked whether the proposed legislation would take the place of federal crop protection loans—a concern apparently prompted by the fact that the FCUA initially gave the Farm Credit Administration responsibility for overseeing federal credit unions—and he responded that it would not. *See* 78 Cong. Rec. 12,224 (1934) (Rep. Luce).

These statements are no evidence that Congress intended anything in the FCUA—much less the common bond provision—as an anti-competition device. In fact,

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[8] The prudential standing limitation would not serve its important separation of powers function, *see Bennett*, 117 S. Ct. at 1161, if a plaintiff could establish its right to sue to enforce *any* provision of the statute merely by bringing itself within the broad purposes of *other* provisions or the statute as a *whole*. The pertinent question is whether the Banks have carried their burden of establishing that they are within the zone of interests protected by the common bond provision. As noted, all the available evidence confirms that that particular provision was enacted to safeguard the interests of credit union members—not banks—by promoting credit union stability.

the relevant legislative history demonstrates precisely the opposite: to the extent Congress thought about banks at all, Congress believed that credit unions were necessary because they would largely serve a market that banks had shunned—not one implicating their competitive interests. *See* ATTF Br. at 5-6, 22.[4]

5. Both the decision below and the Banks' theory depart sharply from this Court's precedents to find standing. This Court has repeatedly emphasized that the zone of interests inquiry turns on congressional intent. *See* ATTF Br. at 18 (quoting cases). The court below expressly acknowledged that Congress did *not* intend to benefit the competitive interests of banks through the common bond provision, *see* Pet. App. 30a, yet nonetheless conferred standing on the Banks as "suitable challengers." While the Banks eschew that approach, they similarly abandon any focus on congressional intent, asking instead simply whether banks are competitors of credit unions—without regard to whether *Congress* viewed them as such or sought to protect their interests as such through the common bond provision. This transforms the inquiry from one of congressional intent into one of regulatory effects. Both the approach of the court below and of the Banks shift the authority for determining who may challenge regulatory actions from Congress to the courts, in contravention of the basis for prudential standing doctrine " 'in concern about the proper —and properly limited—role of the courts in a democratic society.' " *Bennett*, 117 S. Ct. at 1161 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)).

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[4] Moreover, as we have explained and as the Banks do not dispute, credit unions are not now significant competitors of commercial banks, fifteen years after the promulgation of the multiple group policy. *See* ATTF Br. at 28 n.9. In fact, as of the end of 1996, the assets of each of the two largest commercial banks—Chase Manhattan and Citibank—were greater than the assets of *all* federal credit unions put together. *Compare* Sheshunoff Bank Quarterly at I-88 (1997) *with* NCUA 1996 Annual Report 62.

When the zone of interests test is loosened from its proper mooring in the intent of Congress, there is a greater likelihood that parties will seek through litigation to further goals at odds with those intended by Congress in the governing statute. Here, for example, the Banks have sought to have the common bond provision interpreted in accord with their competitive interests in weakening credit unions, while Congress intended for that provision to have precisely the opposite effect. If the zone of interests test is to have any meaning at all, it must deny standing in such a situation.

II. NCUA'S MULTIPLE GROUP POLICY IS A REASONABLE INTERPRETATION OF AMBIGUOUS STATUTORY LANGUAGE

1. Given that the Banks' argument on the merits rests entirely on their contention that Congress has "directly spoken" to the precise issue presented by this case (*see* Resp. Br. at 29), their brief is notable for its cursory analysis of the language of the statute. Indeed, the only word that the Banks expressly rely on from the phrase directly at issue is the article "a" in "a common bond." *See id.* at 33. The Banks, however, acknowledge that the use of the plural "groups" means that each federal credit union may contain more than one group. *Id.* at 35. Thus, as we have explained and as the Court of Appeals agreed, Congress' use of the article "a" could just as easily mean one common bond for each of the separate groups as a single bond shared by all of the groups. *See* ATTF Br. at 35; Pet. App. 6a.

The Banks do not even attempt to counter that position. Instead, they contend, like the Court of Appeals, that the term "common bond" would be " 'surplusage' " if it applied to the members of each constituent group. Resp. Br. at 34-35 (quoting Pet. App. 7a). But the Banks do not defend the reasoning that led the Court of Appeals to this conclusion—that the term "group" necessarily implies the notion of a common bond—and do not even attempt to rebut any of our criticisms of that holding. *See* ATTF Br.

at 35-39. Nor do they offer a different interpretation of the statutory language that would lead to that conclusion. Accordingly, the Banks simply have no answer to our point that the language of the common bond provision permits multiple groups, each with its own common bond.

The Banks' only other argument that refers to the language of Section 109 is their contention that each group in an occupational credit union must share a single common bond, because "community"-based credit unions are limited to groups "within a well-defined neighborhood, community, or rural district," and NCUA interprets that language to mean that all groups must be within a single community. According to the Banks, the two "parallel clauses" should be read in the same way. *See* Resp. Br. at 36-37. But as we have explained (*see* ATTF Br. at 39-40), the clauses are *not* "parallel."[8] While the term "groups *within* a well-defined neighborhood" is perhaps most naturally read as requiring that all groups be within the same community, the term "groups *having* a common bond of occupation" does not similarly require that each group share the same bond. Congress knows how to make these clauses parallel when it wants to, *see* 25 U.S.C. § 473a (quoted in ATTF Br. at 39), but it did not do so here.

Without refuting this textual analysis, the Banks contend that "it is not sensible" to believe that Congress intended for the different language in the two clauses to be interpreted in this manner. Resp. Br. at 37. But the question under the first step of *Chevron*—the only question the Banks have preserved, *see* Pet. App. 6a—is whether Congress' intent is ambiguous, not whether the agency's interpretation is reasonable. The Banks have chosen not to argue that NCUA's interpretation is unreasonable under the second step of *Chevron*. Nor could

[8] A parallel construction would instead be something like "groups having a common bond of occupation or association, or groups having a common bond of neighborhood, community, or rural district residence." In such a case the second clause would simply replicate the ambiguity of the first.

they, for that interpretation is plainly in accord with Congress' policy objectives. *See* ATTF Br. at 46-49.

2. Having no real argument that the statutory language is unambiguous, the Banks posit a novel interpretation of the *Chevron* doctrine: that even where a statute is ambiguous, courts should defer to an agency's interpretation only if Congress specifically "intended to be ambiguous." Resp. Br. at 32. In other words, according to the Banks, *Chevron* applies only to instances of "artful ambiguity rather than inartful awkwardness." *Id.* at 31.

That is not the law. As explained in *Chevron* itself, the principle of deference to agency interpretations applies both to policy choices that Congress "inadvertently did not resolve," as well as to those that Congress "intentionally left to be resolved by the agency." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-866 (1984). Thus, in neither *Chevron* nor its progeny has the Court, after concluding that statutory language was ambiguous, engaged in a separate inquiry to determine whether Congress specifically *intended* to be ambiguous before according deference to the agency's interpretation. Rather, the Court has made clear that "[i]f the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute." *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292 (1988). *Accord, National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 417 (1992) (Deference is owed whenever the "text is ambiguous and so open to interpretation in some respects.").

3. The Banks also contend that NCUA's interpretation is "obviously wrong" because it would purportedly allow the agency "to charter any credit union to admit into membership every employee of every company in the United States." Resp. Br. at 34, 33. This straw-man argument, however, confuses the second step of the *Chevron* analysis—which the Banks have not raised in this case—with the first. As we have explained, *see* ATTF

Br. at 45, NCUA has not (and under current regulations could not) charter such a universal credit union. Nor do the Banks contend otherwise. Instead, they posit that the current policy must be invalid because NCUA might change it to something the Banks would find unreasonable. *See* Resp. Br. at 34 n.23.

But the first step of the *Chevron* analysis asks only whether the agency has interpreted ambiguous language. The issue here is whether Section 109 plausibly may be read to permit federal credit unions to consist of more than one group, each with its own common bond. If NCUA may interpret the provision in this way, the Banks' claim must fail. Whether Section 109 permits NCUA to charter "generic" credit unions or even credit unions that include a large number of groups is a *Chevron* step two issue that the Banks have expressly declined to raise.[6]

Moreover, even if the Banks' policy arguments were relevant to the ambiguity inquiry, those arguments would not help their case. The Banks contend that the common bond provision was intended as a "*limit* on the Agency's policy options," Resp. Br. at 34 (emphasis in original), but they misunderstand the nature of the "limits" the common bond provision was intended to place on credit unions. The provision was not intended to limit the growth of credit unions or to restrict competition. Rather, the limiting principle of the common bond provision—from which all of its perceived benefits can be derived—is that each member must be part of a group with others who are similarly situated, which facilitates lower-cost information on creditworthiness, ease of repayment through

[6] NCUA's discretion is limited by the purposes of the common bond provision to foster the growth and stability of credit unions. For example, if the agency were to approve a single "occupational" group consisting of all persons who are employed, that interpretation—though it might comport with the ambiguous statutory language—could nevertheless be challenged as unreasonable under the second step of *Chevron* as not bearing a rational relation to the purposes underlying the common bond provision.

payroll deductions and the like, and greater certainty of repayment through the moral and social pressure of knowing default would affect fellow co-workers. *See* ATTF Br. at 43-45. That is, in any event, how the agency interprets the statute, and that interpretation is plainly entitled to deference, particularly given that the Banks themselves profess that they "do not know Congress's complete or precise purposes" for the common bond provision. Resp. Br. at 19.

4. The Banks attempt to find in legislative history the clarity that is lacking in the statutory language. The Banks, however, purport to find that clarity not in the legislative history of the common bond provision, but rather in brief excerpts from the FCUA's history not directly addressed to the precise question now at issue. And what is more, the Banks rely principally on "subsequent" legislative history (including hearing testimony) that occurred nearly *fifty years* after the FCUA was enacted. Such dubious legislative history cannot override NCUA's interpretation of ambiguous statutory language pursuant to its expressly delegated powers.

As we have already explained (*see* ATTF Br. at 41), the proper role of legislative history in this case is extremely limited. Under *Chevron*, the Court may indeed use "traditional tools of statutory construction," but only to determine whether the intent of Congress is "clear" as to the "precise question at issue." 467 U.S. at 842-843 & n.9. Where, as here, the statutory language is ambiguous, the Court must defer to the agency's reasonable interpretation unless the legislative history is so clear on the precise question as to compel a contrary resolution.[7]

[7] *See Regents of Univ. of California* v. *Public Empl. Rel. Bd.*, 485 U.S. 589, 603 (1988) ("Where the statute itself is not determinative and is open to more than one construction, the legislative history must be quite clear if it is to foreclose the agency's construction.") (White, J., concurring); *Chevron*, 467 U.S. at 858 (rejecting reliance on legislative history that "was not * * * addressed to the precise issue raised by these cases").

Every court to have examined the legislative history of the FCUA has concluded that it does not definitively answer the "precise issue" in this case: whether the common bond provision permits credit unions consisting of multiple groups, each with its own common bond. *See* Pet. App. 11a-12a, 21a; *First City Bank* v. *NCUA*, 111 F.3d 433, 439 (6th Cir.), *pets. for cert. filed*, Nos. 96-2018 (June 23, 1997) & 97-100 (July 15, 1997). The Banks' citations do not prove otherwise. As for the legislative history of the FCUA itself, the Banks cite a reference from a committee report and several stray statements from individual legislators, all of which generally described a credit union as being composed of a single group of people. *See* Resp. Br. at 45-46. Likewise, the Banks refer to a witness' hearing testimony to the same general effect. *See id.* at 44-45.

As the district court found, these statements did not purport to be elucidating the specific language of the common bond provision at all and "may well be little more than a description of the field of state credit unions as they existed in 1934." Pet. App. 20a. The Banks themselves characterize Mr. Bergengren's testimony as simply "descriptions of credit union practice." Resp. Br. at 43. The fact that some members of the 72d Congress may have understood the credit unions of the day to consist of a single group says nothing about whether that Congress, in Section 109 of the FCUA, unambiguously required that all federal credit unions be similarly constituted.

Given this fact, the Court should not now impose a static structure on all credit unions based on the general characteristics of credit unions as they may have existed in 1934. Among the purposes of the *Chevron* doctrine is to allow the administering agency "ample latitude to adapt [its] rules and policies to the demands of changing circumstances." *Rust* v. *Sullivan*, 500 U.S. 173, 187 (1991) (quotations omitted). Accordingly, given the ambiguity of the common bond provision, NCUA has the latitude to rethink its common bond policy in light of

changed economic circumstances that otherwise would threaten credit union stability and viability. *See* ATTF Br. at 9-10.

Finally, the Banks place great weight on the history of amendments to the FCUA enacted in 1977 and 1982. *See* Resp. Br. at 38-43.[8] It is well-settled, however, that subsequent legislative history is useless in interpreting the intent of a prior Congress.[9] This rule applies with full force here. The 1977 legislation provides that a credit union may purchase assets from another credit union, *see* 12 U.S.C. § 1757(14), and the 1982 legislation provides that NCUA may authorize emergency mergers of failing credit unions in certain circumstances "[n]otwithstanding any other provision of law," *see id.* § 1785(h). The legislative history indicates that the Congress that enacted the 1977 amendment did not view that particular provision as overturning what was then the agency's policy against combining credit unions with dissimilar common bonds, *see* H.R. Rep. No. 23, 95th Cong., 1st Sess. 12 (1977), while the Congress that enacted the 1982 provision intended for it to apply notwithstanding any field of membership or geographic restrictions, or any "requirements of state law." S. Rep. No. 536, 97th Cong., 2d Sess. 8, 50-51 (1982). Nothing more can be gleaned from that legislative history.

The Banks nevertheless contend that a statement made to a committee of Congress in 1981 by the then-Chairman of NCUA somehow constitutes additional legislative his-

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[8] The Banks rightly do not contend that the statutory language of either the 1977 or 1982 amendments (codified at 12 U.S.C. §§ 1757(14), 1785(h)) conflicts with NCUA's interpretation of the common bond provision. Rather, the Banks divine such a conflict solely from the legislative history of those amendments.

[9] *See United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 200 n.7 (1977) ("Legislative observations 10 years after passage of the Act are in no sense part of the legislative history."); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.").

tory that illuminates the intent of the 1934 Congress that enacted Section 109. This testimony is not legislative history at all, and is of no help in the interpretive inquiry now before the Court. *See supra* at 8. In any event, the Chairman's testimony simply clarified that NCUA could not "combine credit unions with unlike fields of membership."[10] The term "field of membership" refers to the definition of a credit union's membership, and there are different types of fields of membership based on the different clauses in Section 109: "occupational" or "associational" fields, based on the common bond clause, and "community" fields based on the "community" clause. Thus, when Mr. Connell stated that NCUA could not combine credit unions "with unlike fields of membership," it is quite likely that he was referring to NCUA's interpretation—which it maintained even after the multiple group policy—that a credit union could not combine community groups together with occupational or associational groups. *See* 54 Fed. Reg. 31,170 (1989).

A year later, Congress enacted Section 1785(h)—which the Banks neglect to note was enacted *after* NCUA promulgated its multiple group policy—authorizing emergency mergers "[n]otwithstanding any other provision of law." 12 U.S.C. § 1785(h). The most that can be said of this amendment from the Banks' perspective is that Congress wished to authorize such mergers notwithstanding any present or future agency field of membership policy or other regulation, and notwithstanding any other provision of state or federal law. If Congress intended in 1982 to clarify the scope of the common bond provision, to express disapproval of NCUA's then-existing multiple group policy, or to dictate future agency policy in this area, it could have done so directly, by amending Section

[10] *Competition and Conditions in the Financial System: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 97th Cong., 1st Sess. 109 (1981) (statement of Lawrence Connell, Jr.). *See also id.* at 112 (written statement noting that "[t]he main obstacle to expeditious merger action is the prohibition against combining credit unions with unlike fields of membership.").

109. It did not do so, and in fact did not even discuss Section 109. The subsequent legislation therefore sheds no light on the question before the Court in this case.

5. The Banks have the burden of showing that Congress "unambiguously expressed [its] intent" that the groups comprising a federal credit union must share a single common bond, rather than each group having its own common bond. *Chevron*, 467 U.S. at 842-843. The Banks do not carry that burden by analyzing the actual language of the common bond provision, which has been given widely disparate readings by the various courts that have considered it. *See* NCUA Br. at 33. Nor do the Banks argue that the purpose of the provision shows Congress' unambiguous intent, confessing instead that "[w]e do not know Congress's complete or precise purposes" for the common bond provision. Resp. Br. at 19. *See also First City Bank*, 111 F.3d at 439 ("we do not pretend to know the rationale behind the common-bond requirement"); Pet. App. 3a ("Congress did not fully explicate the purpose or limits of that provision").

That leaves the Banks relying on legislative history to show an "unambiguously expressed intent"—a heavy burden in any case, but particularly daunting in the face of ambiguous statutory text. When it turns out that the history is primarily of different statutes—both prior and subsequent to the FCUA—and largely hearing testimony rather than actual legislative action, it becomes clear that the Banks cannot carry their burden under *Chevron*.

Given that the statutory language does not unambiguously resolve the precise question at issue here, the Court has a clear choice before it: it can, as *Chevron* dictates, defer to the interpretation of the agency authorized to administer the statute, or it can, as the Banks prefer, defer instead to gleanings from snippets of legislative history, hearing testimony, and post-enactment committee reports. The correct choice is clear. *Chevron* holds that "when an agency is charged with administering a statute, part of the authority it receives is the power to give reasonable

content to the statute's textual ambiguities." *Department of the Treasury* v. *FLRA*, 494 U.S. 922, 933 (1990). No similar authority has been, or could be, given to committee staff members, individual legislators, or hearing witnesses—much less those who served nearly fifty years after the statute was enacted. *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673, 710-725 (1997) (noting the serious separation-of-powers concerns that exist when Congress delegates resolution of statutory ambiguities to legislative history rather than to administrative agencies). Accordingly, in the event the Court were to find that the Banks have prudential standing, it should uphold NCUA's indisputably reasonable interpretation of ambiguous statutory language.

CONCLUSION

For the foregoing reasons, and those set forth in our opening brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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